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VIA EMAIL (meghan.carroll@nfl.com)

Meghan Carroll, Assistant Labor Relations Counsel
National Football League
345 Park Avenue
New York, NY 10154

RE: Lane Johnson and the National Football League – Discovery Dispute

Dear Ms. Carroll:

This letter responds to your September 20, 2016 email titled, “RE: Lane Johnson – Discovery Requests” that details the National Football League Management Council’s objections to Mr. Johnson’s First Set of Requests for Production of Documents. The National Football League Policy on Performance-Enhancing Substances 2015 (“Policy”) provides multiple grounds for Mr. Johnson to challenge his discipline. His discovery requests seek information relevant to these grounds and the NFL’s ability to meet its burdens under the Policy.

When the NFL seeks to discipline a player for an alleged violation of the Policy, the NFL has the burden of:

1. “establishing the Positive Test Result”
2. “and that it was obtained pursuant to a test authorized under the Policy”
3. “and was conducted in accordance with the collections procedures and testing protocols of the Policy and the protocols of the testing laboratory (herein the ‘Collection Procedures’).”

Policy at 16. The Policy includes a presumption that:

The specimen collections, Independent Administrator, Chief Forensic Toxicologist and testing laboratories will be presumed to have collected and analyzed the Player’s specimen in accordance with the Policy. In that respect, the Management Council may rely solely on the information contained in the standard laboratory documentation package (see Appendix G) provided to the Parties, which shall be admissible without regard to

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hearsay challenged, to demonstrate that the test was conducted in accordance with the Collection Procedures, including, without limitation, that the chain of custody of the specimen was maintained.

Policy at 16-17.¹ This presumption is not absolute, as it necessarily requires that the NFL abide by the Policy to benefit from the presumption. If evidence demonstrates the NFL failed to abide by the Policy, then the presumption fails.

For example, Section 2.3 of the Policy requires the NFL to review and approve “annually” the Collection Vendor’s protocols and chain-of-custody documents. Request 12 seeks documents regarding whether the NFL has adhered to this provision of the Policy. Additionally, the Policy prohibits the destruction of “positive specimens” until “30 days” after final adjudication of the player’s discipline. Policy at 20. The documentation package accompanying Mr. Johnson’s discipline notice makes clear that the lab discarded “positive specimens.” Mr. Johnson, in Request 2, requested the protocols of the testing laboratory regarding the retention and destruction of specimens. See Policy at 20. The Policy requires the NFL to approve these protocols, but the NFL refused to produce them.

If the NFL is able to meet its initial burden, Mr. Johnson “may challenge the initial showing by the Management Council that the result was ‘positive’ or that it was obtained pursuant to a test authorized under the Policy or was conducted in accordance with the Collection Procedures.” Policy at 17. In addition, the Policy provides Mr. Johnson an affirmative defense:

A Player is not in violation of the Policy if the presence of the Prohibited Substance in his test result was not due to his fault or negligence. The Player has the burden of establishing this defense.

Policy at 17.

Using the Policy’s description of NFL’s burden and Mr. Johnson’s available defenses as a backdrop, Mr. Johnson narrowly tailored his discovery requests. That the NFL has refused to respond to nearly all of Mr. Johnson’s requests is evidence of the NFL’s disregard for the Policy and the rights it affords Mr. Johnson.

Mr. Johnson’s detailed responses to the NFL’s objections are as follows (for ease of reference, the numbering and headings mirrors your email):

¹ Absent from this presumption is any reference to whether the “positive” test was obtained pursuant to an authorized test.



1. Collection Protocols and Procedures (Requests Nos. 1, 4, 5, 12, 26, 27, 28, 29)

Mr. Johnson may contest that his “positive” result was conducted in accordance with the Collection Procedures. Policy at 17. To do so, Mr. Johnson needs a copy of the Collection Procedures, but the NFL refuses to produce them and the other procedures, policies, and protocols requested by Mr. Johnson.

Mr. Johnson has been requesting these procedures, since the Independent Administrator first notified him of his “A” sample result. More specifically, as permitted by the Policy, Mr. Johnson retained a toxicologist to observe the “B” sample analysis. Policy at 8. The observing toxicologist twice requested a copy of the Collection Procedures and was denied both times.²

Furthermore, the NFL’s suggestion that Mr. Johnson must make a “showing of ‘credible evidence’ that a deviation from the Collection Procedures occurred,” prior to the NFL producing the Collection Procedures is nonsensical. Nowhere in labor law is there an axiom prohibiting a party from obtaining presumptively relevant documents, absent a showing of credible evidence. Even the scope of discovery under Federal Rule of Civil Procedure 26 is not as narrow as the NFL suggests.

2. Laboratory Protocols, Methods, Documents and Testing Thresholds (Requests Nos. 2, 3, 6, 7, 8, 9, 13)

As detailed above, Mr. Johnson may challenge whether the protocols and methods of the laboratory were followed. In fact, the “protocols of the testing laboratory” sought by Request 2 are encompassed in the Policy’s definition of Collection Procedures. See Policy at 16. The NFL’s refusal to provide these protocols is contrary to the Policy.

In response to Request 9, which seeks documents “regarding the threshold required under the Policy to establish a positive test,” the NFL responded that “the presence of Ostarine in a specimen establishes a Positive Test Result.”³ Please produce the document reflecting this. Additionally, if the mere existence of Ostarine results in a positive test, please produce the document detailing the lower limit of detection for the method used by the laboratory to determine the existence of Ostarine.

3. Duties of the Independent Administrator and the Chief Forensic Toxicologist (Request Nos. 10, 11, 14, 22, 24, 41, 42, 43)

Per the Policy, the Independent Administrator and Chief Forensic Toxicologist are neutral parties, and each has specific duties. As agreed by the NFL, their roles and responsibilities “are intended to provide expert medical and scientific oversight of testing procedures to ensure that NFL Players receive the highest level of protection permitted in the administration of the Policy.” Policy at Appendix B.

² The refusal to provide the procedures to Mr. Johnson’s observing toxicologist drastically limited Mr. Johnson’s toxicologist’s ability to observe meaningfully the “B” sample test.

³ The Policy references the NFL’s demonstration of a positive test result “at the level required by the testing protocols.” Policy at 16.



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The Chief Forensic Toxicologist is required to certify any positive results under the Policy. Policy at 9. Request 22 seeks documentation reflecting the Chief Forensic Toxicologist's certification of Mr. Johnson's results. The Policy in Appendix B clearly identifies Dr. Bryan Finkle as the Chief Forensic Toxicologist. While we understand that Dr. Finkle retired, the NFL has not produced any documentation regarding his retirement or discharge, which was nearly a year ago, despite their responsiveness to Requests 41, 42, and 43.

The Policy required the NFL to, within six months of Dr. Finkle's discharge, identify "three successor candidates" from which one would be selected to serve as the impartial Chief Forensic Toxicologist. Nowhere in the Policy does it provide for the appointment of two individuals to serve in this role, as the NFL states occurred.

4. Documents Related to the July 2016 [REDACTED] Memo (Requests Nos. 15, 16)

The Policy creates an affirmative defense where the player can establish "the presence of the Prohibited Substance in his test result was not due to his fault or negligence." Policy at 17. The impetus behind or rational for issuing the [REDACTED] July 16 memorandum and related documents are relevant to Mr. Johnson's affirmative defense.

The NFL objects that these documents are protected by the attorney-client privilege and/or the attorney work product doctrine. Given that the memorandum was issued by the Independent Administrator, that is impossible. There can be no privilege between the Independent Administrator and the NFL, between the Independent Administrator and the NFLPA, or between the NFL and NFLPA. To the extent the NFL continues to withhold these documents on the basis of privilege, please produce a privilege log, so that Mr. Johnson may evaluate the NFL's claimed privilege.

5. Documents Related to Mr. Johnson (Requests Nos. 17, 18, 19, 20, 23, 25, 30, 31)

As the NFL's heading suggests, these documents relate specifically to Mr. Johnson:

- Request 17 seeks the "medical evaluations of Johnson" performed by the Independent Administrator."
- Request 18 seeks documents regarding tests performed on Mr. Johnson's blood and urine samples.
- Request 19 seeks documents regarding the type of test for which Mr. Johnson provided blood and/or urine samples (e.g., whether Pre-Employment, Annual, Reasonable Cause, etc.).
- Request 20 seeks the NFL's communications regarding Mr. Johnson's blood and urine tests.
- Request 23 seeks documents regarding the Chief Forensic Toxicologist's "review and certification of any of Johnson's laboratory results."
- Request 25 seeks guidance the Independent Administrator relied upon in administering the Policy with regard to Mr. Johnson.



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- Request 30 seeks "all communications from the Independent Administrator to Johnson."
- Request 31 seeks "all communications between the NFL and Independent Administrator regarding Johnson."

Again, and despite the NFL's objection, it is unclear how any of these materials could be protected by the attorney-client privilege or attorney work product doctrine. To the extent that the NFL continues to claim privilege, please produce a privilege log.

The manner in which the NFL, Independent Administrator, and Chief Forensic Toxicologist have administered the Policy, as it relates to Mr. Johnson is relevant to his discipline. Additionally, the NFL's contention that Mr. Johnson's testing records are irrelevant or otherwise not subject to discovery is in direct conflict with Mr. Johnson's ability to challenge the nature of his test. Policy at 17. Furthermore, the NFL's attempt to seize control of documents held by the neutral Independent Administrator and prohibit their production is not authorized by the Policy.

6. Documents Related to Mr. Johnson's Discipline Under the Policy (Requests Nos. 21, 34)

Request 21 seeks "communications between the NFL and any other person or entity regarding discipline issued to Johnson from January 1, 2013 to the present." Request 34 seeks "the policy under which the NFL disciplined Johnson in July 2014." These are straightforward requests. Rather than produce the applicable policy and responsive communications, the NFL asserts that the Requests are "vague, ambiguous, irrelevant, overbroad, unduly burdensome..." It also disingenuously states the requested documents, including the policy, are somehow protected by the attorney-client privilege or attorney work product doctrine. The NFL's objection that communications of which Mr. Johnson was not a recipient "are already in Mr. Johnson's possession, custody, or control and/or equally available to Mr. Johnson" is nonsensical. Furthermore, that a requesting party may possess a document requested is not a legitimate objection.

The NFL alleges this is Mr. Johnson's second offense under the Policy. Documents related to any prior discipline, as well as his current discipline, are relevant to his appeal.

While the NFL has produced some documents responsive to the Request 21, it has not produced the policy requested in Request 34. In reviewing the handful of documents the NFL produced, Mr. Johnson understands that the NFL's contention is that it has not communicated in any documents, things, or electronically stored information with anyone about Mr. Johnson. If that is the case, please indicate that no such documents exist.

7. Documents Related to Other NFL Players (Requests Nos. 32, 33, 35, 36, 37, 38, 39, 40)

As demonstrated above, the NFL has deviated from the Policy in many ways. The manner in which the NFL has disciplined players, particularly where it appears the discipline the NFL levied on a player deviates from the Policy, directly relates to Mr. Johnson's case. These deviations establish a past practice. As an example, Request 35 seeks documents related to the NFL's decision not to suspend [REDACTED] following



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his positive test for a substance banned under the Policy. It has been reported that the banned substance was clenbuterol – a banned substance, which Mr. [REDACTED] unknowingly ingested via tainted beef in Mexico.

The NFL issued a “Warning: Contaminated Meat” memorandum in which it instructed players that Mexican beef could be contaminated with clenbuterol and instructing players that if they “decided to consume meat” they do so at their “own risk.” The NFL suggests that Mr. Johnson should request this information from the NFLPA. However, the NFLPA likewise refused to provide it and stated that Mr. Johnson should direct all requests for information to the NFL. This game playing demonstrates the lengths to which the NFL will go to prohibit Mr. Johnson from exercising his rights under the Policy.

Request 40 seeks documents “regarding communications from the NFL, NFLPA, Independent Administrator, and/or Chief Forensic Toxicologist to NFL players regarding the Policy.” At minimum, Mr. Johnson is entitled to copies of the communications sent to him. This is especially true of the Independent Administrator’s communications. The same holds true for Request 33, which seeks any communication from the NFL to Mr. Johnson regarding “any explanation as to how the Policy will or could affect [his] earlier discipline.” If none exist, then say so.

The NFL objected to these Requests, in part, based on the attorney-client privilege and/or the attorney work product doctrine. It is impossible for the communications from the NFL, Independent Administrator, or Chief Forensic Toxicologist to Mr. Johnson to be protected by either the attorney-client privilege or the attorney work production doctrine. Furthermore, Section 11 does not prohibit the production of these communications.

8. Identity of Arbitrators and Operation of Appeals (Requests Nos. 45, 46, 47)

Again, the NFL seeks to enforce the Policy strictly against Mr. Johnson, while refusing to provide evidence of its adherence to the Policy or legitimate grounds for known deviations. Specifically, the Policy requires the NFL to “select...no fewer than three but no more than five arbitrators to act as hearing officers for appeals under Section 6...” Policy at 13. This group of arbitrators is to select a Notice Arbitrator, who is responsible for assigning one arbitrator “to cover every Tuesday of the playing season through the Super Bowl.” Additionally, “[a]ppeals will automatically be assigned to the arbitrator assigned to cover the fourth Tuesday following the date on which the Payer is notified of discipline.” Policy at 13. This integral provision has not been followed. Mr. Johnson is entitled to an explanation as to why. Requests 45, 46, and 47 seek to determine whether the NFL has abided by the requirements in the Policy, particularly as it relates to the assignment of the arbitrator to hear his Section 6 discipline appeal.

The NFL’s responses do not address Request No. 44, which seeks documents related to the identity of the “Medical Advisor” under the Policy. Please produce documents responsive to this Request.

The NFL seems to have forgotten its commitment to “the importance of transparency in the Policy’s procedures, including the scientific methodologies that underlie the Policy, the appeals process and the basis



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for discipline imposed..." Policy at 2. Mr. Johnson's asks the NFL to abide by its promise of "a fair system of adjudication" (Policy at 2) and reconsider its refusal to produce the requested documents.

If you have questions, or would like to discuss these matters before tomorrow's calls with Arbitrator Carter, please contact Stephen Zashin (ssz@zrlaw.com), Pat Hoban (pjh@zrlaw.com), or me (drv@zrlaw.com).

Very truly yours,

ZASHIN & RICH CO., L.P.A.



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